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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

## No. 288.

IN THE MATTER OF THE DETERMINATION OF GOOD MORAL CHARACTER OF MICHAEL ZIPKIN.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

## BRIEF FOR PETITIONER MICHAEL ZIPKIN.

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### OPINIONS BELOW.

The order of the court below (R. 118) is unreported The findings and order of the State Board of Law Examiners (R. 93-104) are unreported.

### JURISDICTION.

The court below entered its judgment on April 10, 1961 (R. 118). Petitioner's motion for rehearing was overruled on May 8, 1961 (R. 122). The petition for a writ of cer-

tiorari was granted on October 9, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

## QUESTION PRESENTED.

Whether petitioner has been denied permission to take the Missouri bar examination in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because there is no rational justification in the record for the finding of the Missouri Board of Law Examiners that petitioner is not a person of good moral character.

## CONSTITUTIONAL PROVISION INVOLVED.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part as follows:

> "No state shall . . . deprive any person of life, liberty or property without due process of law . . . ."

## STATEMENT.

### I. Background to the Board of Law Examiners Hearing.

In June of 1960, at the age of twenty-five, petitioner Michael Gerald Zipkin, from Kansas City, Missouri, graduated from the University of Missouri School of Law at Columbia, Boone County, Missouri (R. 37, 68, 93). He had attended the University of Missouri and later the Missouri University Law School since 1953 (R. 68).

On February 19, 1959, having investigated him with regard to his law student registration filed December 15, 1958, the bar committee for the Missouri Sixteenth Circuit

(Kansas City, Jackson County) found that petitioner was of good moral character. And on May 4, 1960, after investigating petitioner with regard to his application to take the Missouri bar examination, the bar committee for the Thirteenth Circuit likewise found that petitioner was of good moral character (R. 93, 101).[1] Petitioner took the June, 1960, Missouri bar examination, but did not pass (R. 94).

While the bar examination papers were being graded, however, a member of the Board of Law Examiners was informed by a Boone County, Missouri, attorney[2] that petitioner allegedly had held himself out as an attorney, and had attempted to influence the testimony of a witness at the hearing before the State Board of Healing Arts of one Dr. Freeman, a Columbia, Missouri, psychiatrist (R. 93). The Freeman hearing was held on June 25, 1960 (R. 3), and resulted in Dr. Freeman's license being revoked for unprofessional conduct (R. 93).[3]

An investigation of the charges against petitioner was made at the instance of the Board of Law Examiners, and when petitioner failed the bar examination, he was notified on or about September 13, 1960, that if he desired to

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1. While the Board of Law Examiners' opinion referred to the Thirty-fourth Circuit (New Madrid and Pemiscot counties), there is apparently no question that this should be the Thirteenth Circuit, consisting of Boone and Callaway Counties, as it seems clear that the character investigation upon petitioner's application to take the Missouri Bar examination was carried on at Columbia in Boone County.

2. The name of the complaining lawyer was never revealed by the Board, notwithstanding the efforts of petitioner and his attorney to find out (R. 2, 107-108).

3. The Freeman matter has now been appealed to the Missouri Supreme Court, *Freeman* v. *Board of Registration for the Healing Arts*, Docket No. 49008.

take a second examination, it would be necessary for the Board to investigate further the matter of petitioner's character and hold a hearing thereon (R. 94, 105-106). Petitioner replied that he wanted to take a second bar examination in February, 1961, and asked that he be informed of the questions raised regarding his character, the facts pertaining to and the persons raising the same, and that he be given notice as to the time and place of the hearing (R. 95, 107). The Board thereafter advised petitioner that a hearing would be held on October 21, 1960, at the Missouri Law School, and that the hearing would be particularly directed to the questions of whether petitioner had held himself out as a member of the bar in connection with certain Columbia divorce litigation and whether he had influenced or attempted to influence a witness or witnesses to misrepresent or withhold facts in connection with the Freeman hearing (R. 95, 108-109). Petitioner requested and was provided with the names of the witnesses the Board intended to subpoena in regard to the charges, and petitioner was advised that he could present evidence, request issuance of subpoenas and be represented by counsel (R. 95-96, 109-111).

## II. The Hearing and the Testimony.

The hearing before the Board of Law Examiners was held in Columbia on October 21, 1960, as scheduled. Petitioner was present in person and represented by an attorney (R. 1, 96). The witnesses who testified were those the Board had advised petitioner it intended to subpoena, plus Mrs. Ada Margaret Baurichter and petitioner himself. All of the witnesses who testified before the Board were personally acquainted with petitioner for terms ranging from a few months to over two years (R. 100).

**A. Carl Sapp.**

Carl Sapp, a practicing attorney of Columbia, Boone County, Missouri, of approximately twelve years (R. 3), testified that he had known petitioner for about six or seven months (R. 4); that while he was not acquainted with petitioner's reputation (R. 5), "his conversation and conduct at the times that I have seen and talked to him have been above reproach and he has conducted himself as a gentleman in my presence" (R. 5); and that he would sign a character affidavit for petitioner (R. 5).

Mr. Sapp also testified that he represented Dr. Freeman in the hearing before the State Board of Healing Arts on June 25, 1960 (R. 3); that he never employed petitioner or worked with petitioner in any manner (R. 4); that he never requested petitioner to interview witnesses or gather evidence in regard to the Freeman hearing (R. 4-5); that to his knowledge petitioner never engaged in interviewing witnesses or gathering evidence with regard to Dr. Freeman's hearing (R. 4); and that petitioner "never played a part in the hearing" (R. 7).[4]

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4. Mr. Sapp further testified regarding events related to a divorce action filed by his client, Ada Margaret Baurichter, against her husband (R. 5-7). Mr. Sapp stated that there was "considerable community feeling" in Columbia and Boone County by reason of the Freeman hearing and the Baurichter divorce proceeding (R. 6-7); that in June of 1960 "there were rumors all over the community about Dr. Freeman and Ada Margaret Baurichter," most of which "were believed whether there was evidence or not" (R. 7); that the complaint against Dr. Freeman was made by Mrs. Baurichter's brother (R. 6); and that the issue of petitioner's character is "very definitely" tied in with the community feeling toward Dr. Freeman and Mrs. Baurichter (R. 7).

**B. Loren D. Baurichter.**

Loren D. Baurichter, the husband of Ada Margaret Baurichter, testified that he had known petitioner probably a year, more or less (R. 8); that their acquaintance was social and that it has always been on a friendly basis (R. 8); that petitioner had been a guest in the Baurichter home for a ham breakfast, at which time petitioner "acted as a gentleman" (R. 13); that he had nothing against petitioner's character and has always had good relationships with his friends (R. 10); that he considered petitioner a fairly good friend (R. 12); and that he had no reason to see otherwise than that petitioner was a person of good reputation (R. 18).[5]

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5. Mr. Baurichter also testified that he was estranged from his wife and that divorce litigation was pending between them (R. 8); that petitioner had come out to his home and farm in the early part of May, 1960, when Mrs. Baurichter moved out, to help her move some furniture (R. 12-15); that petitioner had subsequently come to his home with Mrs. Baurichter when she came to take an inventory (R. 9-12, 15, 17-18); and that on this latter occasion, petitioner made the statement that "I think I know a little more about it than you do. I am a lawyer." (R. 9).

It was in relation to this latter incident that the Board inquired of Mr. Baurichter and of his hired hand, James Earl Grant (Mo. S. Ct. Record, 158-161, 163-166, 176-178), regarding petitioner's alleged statement that he was a lawyer. Petitioner (R. 74-76; see *infra*, footnote 10) and Mrs. Baurichter (R. 42-43; see *infra*, footnote 7) both denied that any such representation was made, but the testimonial conflict became inconsequential because the Board expressly stated in its decision that petitioner was not disqualified on the ground that he held himself out as an attorney. See text, *infra*, p. 17. (The testimony of James Earl Grant (Mo. S. Ct. Record, 157-178) only dealt with the attorney-representation issue and collateral matters, and therefore was not printed in the Transcript of Record and is not discussed herein.)

### C. Professor Edmond R. Anderson, Jr.

Professor Edmond Ralph Anderson, Jr., of the Missouri Law School testified that he had known petitioner since the spring semester of 1958 (R. 21); that he knew petitioner as a student and socially (R. 21-22, 25); that he thought petitioner met the requirements for admittance to the Missouri Bar (R. 26); that petitioner was fit to be a member of the Bar (R. 28); that petitioner's reputation for character and truthfulness was good (R. 29-30); and that "Everybody that I know whose judgment I would respect around here has also thought well of Michael Zipkin, and in Kansas City where I understand he lives now, former students of mine speak well of him" (R. 29).[6]

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6. Professor Anderson further testified that his wife had been a patient of Dr. Freeman (R. 22); that petitioner and Dr. Freeman were fairly friendly (R. 22); that petitioner never stated that he was Dr. Freeman's attorney or that he represented Dr. Freeman (R. 23); that Dr. Freeman's hearing before the State Board of Healing Arts in the summer of 1960 was "Widely publicized and discussed in conversations and by rumors in this area" (R. 23); that he had heard that perhaps petitioner "was giving some moral support to Dr. Freeman as a friend or as a person who would stand by him" (R. 23); that although he didn't know anything about it, there was among the rumors going around a rumor that perhaps petitioner was interviewing witnesses or gathering evidence in preparation of Dr. Freeman's hearing (R. 24); and that "I have grave doubts that [petitioner] would do anything like that" (R. 29).

Professor Anderson also testified that one Michael Trombley was one of his students and that his character was good (R. 30-31); that Professor Anderson used to think of the two Michaels together, petitioner and Trombley; that he understood they were both patients of Dr. Freeman; that Trombley came from a more wealthy background and was a kind of high society type; that he thought Trombley's relationships with Dr. Freeman's friends were perhaps up and down and that Trombley was perhaps wilder than some of the rest; that he felt petitioner was to be commended in this, petitioner being more conservative and sensible; and that Trombley has changed radically and is considerably conservative now (R. 31).

**D. Dean Joseph Covington.**

Dean Joseph Covington of the Missouri Law School testified that he first remembered petitioner as a student in late 1958 or early 1959 (R. 32); that petitioner had never been in any of his classes and he had known petitioner only in his capacity as Dean (R. 33); that in regard to the general requirements of character and fitness, he had no knowledge that would prohibit petitioner's serving as an attorney (R. 33); that he was not acquainted with petitioner's reputation among his acquaintances and associates in and about Columbia (R. 33); and that so far as the law school's records indicated, petitioner had good grades and good background (R. 40).

**E. Ada Margaret Baurichter.**

Mrs. Ada Margaret Baurichter testified that she had known petitioner approximately a year and a half (R. 44-45); that she became acquainted with him when they were both patients of Dr. Freeman (R. 44-45); that petitioner was "very highly spoken of" (R. 44); and that she would say his reputation was good (R. 44).[7]

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7. Mrs. Baurichter also testified that she was the mother of five children (R. 41); that she and her husband were separated and that she had brought a divorce action against him (R. 41); that she moved out of her husband's house on approximately the second or third of May, 1960 (R. 45); that she couldn't possibly move by herself and she asked petitioner to go along (R. 41, 46); that petitioner did so, and drove the car with a trailer and helped her move some furniture (R. 41, 48); that subsequently she obtained a lawyer, Carl Sapp, and he wanted her to go back and take an inventory of what was left on the farm (R. 42, 45-46); that Mr. Sapp suggested she take someone with her when she was reluctant and afraid to go alone (R. 45, 50); that she told Dr. Freeman that Mr. Sapp said to take someone with her and Dr. Freeman said that petitioner probably would go (R. 51); that petitioner did accompany her to take inventory some time before the sixth of June, approximately (R. 45); and that on that occa-

### F. Michael J. Trombley.

Michael J. Trombley, a twenty-six year old Columbia, Missouri, attorney who had received his law degree at Missouri University in February, 1960, testified that he first became acquainted with petitioner in their freshman year, 1957 (R. 55); that he and petitioner were law students together (R. 62); that they were then on friendly terms, close friends at one time, talked a lot and did things together (R. 55, 64); that they had been in Dr. Freeman's home along with Mrs. Trombley and the Baurichters (R. 64-65); and that they had not associated together as they once did because "Well, primarily over this Dr. Freeman deal" (R. 58).[8]

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sion petitioner said to Mr. Baurichter and James Earl Grant that "I'm studying to be a lawyer and I possibly know more of the law than you do." (R. 42, 50).

Mrs. Baurichter also testified that petitioner had never done any work for her in connection with her divorce by way of interviewing witnesses or obtaining testimony (R. 50); that Carl Sapp was her lawyer (R. 50); that she was a witness at the Freeman hearing before the State Board of Healing Arts (R. 53); that she did not discuss her proposed testimony with petitioner before that hearing (R. 53); that she did not discuss the Freeman case at all with petitioner, except perhaps in a group (R. 53, 54); and that she never heard petitioner discuss the Freeman hearing with any other person that may have been a witness or might have given testimony (R. 54).

8. Trombley explained that he and his wife at one time were patients of Dr. Freeman (R. 62) and were in association with him (R. 58); that "the situation came up where a lot of things were being questioned. He was acting in a questionable manner and so forth. At which time we broke off relationship with Dr. Freeman" (R. 58); that petitioner came over to the Trombley house twice after that (R. 58); that Trombley talked with petitioner about Dr. Freeman and the Trombley-Zipkin friendship "just ended right there" (R. 58); that there was "[n]othing whatsoever" about petitioner, about his character or his actions, that caused this (R. 58); and that it was more petitioner's association with Dr. Freeman (R. 58)

Trombley testified that he and his wife employed a housekeeper by the name of Irene Weirhake, that Irene had lived in their home, in a basement apartment, since November, 1959; and that she had been a patient of Dr. Freeman on and off for over a year at least (R. 55-56). Trombley stated that while Irene was still under treatment from Dr. Freeman, she was informed that she was to appear against him (R. 60); that she was very confused and asked Trombley what she should do (R. 60, 67); that Trombley told her to tell the truth (R. 60); that she went to Dr. Freeman and told him she was going to be called and that she was going to tell the truth (R. 60); that Dr. Freeman told her that this would not be wise (R. 60); and that "She came home to tell me and my wife of this . . ." (R. 60).

Trombley testified that shortly thereafter, within a matter of a couple of days, and before the Freeman hearing, a call came in from petitioner (R. 56, 60); that his wife answered on one phone and he answered in a short period of time on another (R. 56, 60); and that "Everyone was speaking" (R. 56). Trombley testified as to the substance of the conversation as follows:

> "A. Sir, Mr. Zipkin was talking to my wife when I picked up the receiver. He mentioned the fact that he was helping Dr. Freeman with his case and that things were looking well, that there had been some new material, or something new had come up but there was a problem in that Irene, I mean Mrs. Weirhake, was in a truth telling mood and that he felt that my wife and I should meet with he and Dr. Freeman to see what could be done about Mrs. Weirhake.
>
> "Q. Now, was there any further conversation other than that?
>
> "A. Well, I think at this time I interjected and my wife had been doing all the talking. I said, 'Are you

> trying to intimidate a witness? What is going on?' He said, 'I think it would be better for everybody all the way around if we met and decided what to do with Mrs. Weirhake.'" (R. 57).

Trombley testified that he shortly hung up the phone (R. 57); that thereafter he had no conversations with petitioner with reference to Dr. Freeman's hearing (R. 57); and that he had no knowledge that petitioner approached Irene personally, either before the telephone conversation or after (R. 61). In response to a Board member's question as to what in particular Trombley heard over the phone that caused him to suggest that petitioner was attempting to intimidate a witness, Trombley replied that "I sort of maybe jumped to conclusions but you take the preceding incident that I discussed, that Irene had told me about, and connected it with this [telephone] incident" (R. 60).

When asked by petitioner's attorney regarding petitioner's reputation in the community for veracity and morality, Trombley stated "I hear it both ways"; "I just don't rightly know how to answer that because I hear it both ways"; and, when pressed for his personal opinion, "I don't think it is particularly good" (R. 62-63). Trombley testified that he made up his mind to this after his talks with petitioner in the last few months of their association (R. 63, 67); that he first made up his mind in 1960 (R. 63); and that he did not have any opinion in 1959 (R. 63). Upon further questioning, Trombley stated that he had been a character witness for petitioner in his 1959 divorce case; that he had been asked then about petitioner's reputation in the community for veracity and morality; and that his answer at that time was "good" (R. 63).

**G. Michael G. Zipkin.**

Petitioner Michael Gerald Zipkin testified that he was introduced to Dr. Freeman by the Trombleys, who were close friends of Dr. Freeman at that time, in approximately December of 1958; that he thereafter became a patient of Dr. Freeman; and that he went to him because of his marital difficulties and because of having a difficult time in school, wanting to study but not being able to concentrate (R. 68-69). Petitioner stated that at that time Trombley was "the closest friend I ever had" (R. 69, 85) and "I considered Mr. and Mrs. Trombley to be very close" (R. 85).[9] As to what precipitated the rift between them, petitioner testified that Trombley developed "an almost fanatical hatred for Dr. Freeman" (R. 69); that when the Trombleys separated from Dr. Freeman petitioner did his best to maintain his friendship with both Dr. Freeman and the Trombleys and gradually it became impossible (R. 85); that every time petitioner would go over, even to comfort Trombley after his bar exam, he would go into a harangue about Dr. Freeman (R. 85); that the Trombleys "just got mad at me because I was seeing Dr. Freeman" (R. 69); and that "the phone conversation ended any friendship" (R. 85).

Petitioner stated that he called the Trombley home about one month before the Freeman hearing (R. 80).

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9. Petitioner stated that he and Trombley sat together in the classes and helped each other during law examinations (R. 85); that Trombley testified as a character witness at petitioner's divorce hearing (R. 69, 85); that when petitioner moved out of his apartment before the divorce he called Trombley and asked if he could stay at his house that night (R. 85); that later on Trombley was instrumental in getting petitioner a place to live the remaining part of the year at a legal fraternity house which petitioner was not a member of (R. 85); and that the Trombleys invited petitioner to Mrs. Trombley's home over the week-end in Trenton (R. 85).

When asked to tell the Board the gist of the telephone conversation, petitioner testified as follows:

> "A. Yes. At the time I made that call I was under the impression that Mr. and Mrs. Trombley were still my friends. I think Mr. Trombley said he hadn't seen me prior to that time but he took the bar this last February and I was at his home cheering him up. I was cheering him up telling him he was smart enough to pass it, so on and so forth. So, at that time we were still pretty good friends and I was a guest over there even though they were no longer seeing Dr. Freeman. I saw no reason not to see them just because they weren't patients of his any more. But, oh well, anyway I called him on the phone because I had heard this Mrs. Weirhake was going to accuse Dr. Freeman of rape or sexual immorality. At that time I knew Dr. Freeman was going to have a hearing but I didn't know who the witnesses were going to be, or anything, and as a—what I consider to be a friendly gesture—I called up the Trombley home. I did it because I had been told that Irene Weirhake had gone loco and of a sudden decided to accuse Dr. Freeman of rape or sexual immorality, whatever it was, and I called him up to inform them of this. Mrs. Trombley answered the phone. I said, 'This is Mike Zipkin,' She said, 'Yes.' And within a period of, I don't know, two or three minutes not that long, seconds. I heard the extension or somebody clinking the telephone. I said, 'And I just heard Irene Weirhake is going to accuse Dr. Freeman of rape and I wanted to tell you about this because if Irene gets into a mess she is just liable to drag you into it. She lives with you and your being ex-patients of Dr. Freeman I thought you ought to know about it. If she gets into a messy situation you and Mike might be dragged into it.' Well I just barely got the words out of my mouth when Mrs. Trombley screamed over the phone, 'Listen, Zipkin, you can't scare us and don't you ever try to frighten us.' And just about that same instant he said, 'Let me talk a

while. Dr. Freeman is going to lose his license, practice and his money and his property and his home and he is going to be driven out of Columbia. He is going to be run out and you are involved because you are trying to intimidate a witness.' And I said, 'This is Mike Zipkin. I'm not trying to intimidate you and Mike or Irene or anyone. All I wanted to do is tell you. If you want to call tomorrow and talk to me or Dr. Freeman, or talk to somebody, about what the information is about I'll tell you what I know.' The difficulty with the conversation was that not only had Trombleys known that Irene was going to testify but I understand they were instrumental in getting her to testify. * * * There was just nothing regarding any kind of intimidation. I wouldn't do a thing like that." (R. 71-72).

Later on, when petitioner was questioned again about the telephone conversation, the colloquy proceeded as follows:

"Q. Now, referring back to the phone conversation you had with the Trombleys, I believe you said something to the effect that this Irene woman is going to testify against Dr. Freeman and you folks may be dragged into it. Now, what was the purpose of your call? What possible good could you have done in telling them that when they, of course, were as well aware of it as you?

"A. Well, in the first place I did not know that they knew about it. I thought it was something on a fresh rumor. Secondly, prior to this time when Mr. and Mrs. Trombley had ceased their relationship professionally with Dr. Freeman they made the statement to me, 'You know, Mike, Mike Trombley is going to be a lawyer and we want to set ourselves up in this town and become members of the community and we just can't take a, well, we just can't stand, we won't be able to stand the gossip that is going on about him.'

"Q. When was that said?

"A. This was said in a casual conversation in their home sometime prior—after the split with Freeman but prior to his hearing, I believe. My impression of the Trombleys' split with Dr. Freeman on Mrs. Trombley's part is that she was afraid, she was frightened that being a patient of Dr. Freeman and hearing all the gossip it would reflect on her and her husband.

"Q. What did you propose to do with regard to this Irene person?

"A. I didn't propose to do anything.

"Q. When you called them up?

"A. Nothing.

"Q. What were you going to suggest?

"A. No, sir. I wasn't going to suggest anything. Irene was really their problem because, as I told them over the telephone, 'Irene is going to get herself involved in what looks like a messy situation and I am afraid you guys might get involved in it. I wanted to tell you about it because I am afraid you might get involved in it because you are ex-patients of Dr. Freeman', and because my understanding was they were afraid of gossip. They were afraid of rumors because Mike was going to practice here. They were going to set up their home here.

"Q. Were the words, 'Irene is in a truth telling humor or mood' used in the conversation?

'A. Sir. I have never used those words.

"Q. Then, of course, you heard Mr. Trombley testify?

"A. Yes.

"Q. Then when he testified to the effect you said, 'Irene is in a truth telling mood and we ought to do something about it' that is just not the truth?

"A. Yes, that is not the truth. I did not say that to him.

"Q. And you did not say anything that would lead any person to believe the same effect as those words?

'A. No, I said nothing to them in any conversation which had any hint of intimidation toward Irene or

anyone else. I merely called them as a friendly gesture to inform them of something that I didn't know they knew because she was living with them and they were ex-patients of Dr. Freeman. She had told me she was afraid of gossip and I wanted them to know that the woman that was living with her was involved in the Freeman hearing and that they ought to know about it. They, of course, already knew about it and there was no intimidation involved on the phone call. It was a friendly conversation." (R. 77-78).

Petitioner further testified that he did not talk with Dr. Freeman or anyone about making the call to the Trombleys (R. 79-80); that he never discussed with Dr. Freeman, after he had made call, the fact that he had made it (R. 80); and that "I have never spoken to Irene about anything connected with the Freeman matter" (R. 80). Petitioner also stated that he never had any discussions with Dr. Freeman or Mr. Sapp about the testimony of any other witnesses (R. 84); and that he did not make any phone calls to anyone about any other witnesses (R. 86).[10]

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10. Petitioner was interrogated further about his telephone call to the Trombleys, and he went through the essentials of his testimony about it three additional times (R. 80-83; 87-88; 89-90).

Petitioner was also questioned about his trips to the Baurichter farm with Mrs. Baurichter and the events thereof (R. 72-77). Petitioner testified that while at the farm on the inventory trip he said something to the effect of "I know this law a little better than you do" or "I think I know a little more about the law on this than you do" (R. 74-76), but petitioner denied that he ever said he was a lawyer (R. 75-76). As already pointed out, *supra*, footnote 5, the attorney-representation charge was expressly rejected by the Board in its decision. See text, *infra*, p. 17.

## III. The Decisions of the Board of Law Examiners and the Court Below.

On February 13, 1961, the Board of Law Examiners' decision that petitioner was not a person of good moral character and that he should not be permitted to take the bar examination was filed in the Missouri Supreme Court (R. 93). Four members of the Board concurred in the decision (R. 101), and one member dissented (R. 102).

The Board expressly stated that petitioner was not disqualified on the alleged ground that he held himself out as an attorney:

> "The Board finds that there was no substantial evidence before it to support the allegation that the applicant had held himself out as an attorney in connection with certain divorce litigation pending in Boone County, Missouri." (R. 98).

The Board reviewed the evidence in this regard and concluded:

> "Because of the conflict of the testimony on this point and the fact that only this one isolated instance of holding himself out as an attorney is charged, the applicant is not disqualified on these grounds." (R. 99).

On the intimidation charge, however, the Board found against petitioner:

> "Based on the record of the hearing before the Board, therefore, it is the finding of the Board that applicant Michael Zipkin did attempt to influence the testimony of Irene Weirhake by approaching Mr. and Mrs. Trombley with the suggestions as testified to by Trombley, that applicant Michael Zipkin was not telling the truth in his testimony before the Board with regard to what he said in the telephone conversation to Mr. and Mrs. Trombley and as to whether or not he

knew when he telephoned them that Mrs. Weirhake was going to testify as to sexual relations with Freeman." (R. 98.)

The Board stated that the testimony of Trombley and petitioner regarding the telephone conversation was irreconcilable; that in concluding that petitioner was not telling the truth the Board was believing one witness and disbelieving the other; that it did not believe it was necessary to have independent corroboration of Trombley's testimony on this point, particularly in view of the inconsistencies in petitioner's own testimony; that the burden of proving good moral character had not been satisfied by petitioner; and that the Board did not feel bound by the prior determinations of the Sixteenth and Thirteenth[11] Circuit bar committees because the information on which the Board acted had not been before or considered by either of the Circuit bar committees (R. 100-101).

The Board summarized the testimony of the witnesses other than petitioner regarding his character and reputation, and commented as follows:

> "Even though it might be said that the evidence preponderates in favor of the reputation of the applicant for good character, yet the general reputation would have to yield in deciding this matter, to the specific acts and facts with regard to the telephone conversation above set out, as the determinative factor." (R. 100).

Board member Oliver dissented (R. 102-104). He discussed the constitutional issue; relied on *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, quoting from the concurring opinion in that case to the effect that the "refusal to allow a man to qualify himself for the profession on a

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11. See footnote 1, *supra*.

wholly arbitrary standard or a consideration that offends the dictates of reason offends the due process clause"; and concluded that "the evidence in this record does not afford a sufficiently substantial factual basis upon which a finding of lack of good moral character can be predicated." (R. 103-104.)

Turning to the Missouri Supreme Court, petitioner filed a Motion for Judicial Review and Exceptions to Findings of State Board of Law Examiners, and Suggestions in support thereof (R. 114-118). Petitioner urged, *inter alia*, that the Board's findings were not supported by competent and substantial evidence upon the whole record, and that the Board's findings and order "violates petitioner's constitutional rights in that it denies him due process of law" (R. 114). In his Suggestions in support of the motion, petitioner quoted the Fourteenth Amendment to the United States Constitution; discussed *Schware* and the first *Konigsberg case*;[12] and concluded that under their authority, the decision of the Board of Law Examiners was "arbitrary, capricious and unreasonable, and in violation of petitioner's constitutional rights." (R. 115-118).

On April 10, 1961, without hearing oral argument, the Missouri Supreme Court entered a summary order overruling petitioner's exceptions and affirming the findings and order of the Board (R. 118). On May 8, 1961, petitioner's motion for rehearing (R. 119-122) was overruled (R. 122).

## ARGUMENT.

Petitioner realizes that in determining the qualifications of applicants for the bar, state law examiners and

12. *Konigsberg* v. *State Bar of California*, 353 U.S. 252.

courts have difficult and often thankless duties, of important consequences to the bar and the public. Petitioner also appreciates the fact that "satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion . . . ." *Schware* v. *Board of Law Examiners*, 353 U.S. 232, 248 (concurring opinion). Nevertheless, as also stated in the concurring opinion in *Schware*, "judicial action, even in an individual case, may have been based on avowed considerations that are inadmissible in that they violate the requirements of due process. Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause." And, as follows in that concurring opinion, "Such is the case here." *Id.* at 249.

The conclusion of the Missouri Supreme Court and the Board of Law Examiners from the record that petitioner is not a person of good moral character is contrary to the philosophy of this Court's decisions in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, and *Konigsberg* v. *State Bar of California*, 353 U.S. 252. Those cases firmly established the constitutional principle that a person cannot be excluded from the practice of law for reasons that contravene the Due Process Clause of the Fourteenth Amendment, and thus that "a person cannot be prevented from practicing except for valid reasons," *Schware* v. *Board of Bar Examiners, supra* at 239, footnote 5, nor can a state bar committee reject an applicant "[w]ithout some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him," *Konigsberg* v. *State Bar of California, supra* at 273. Reversing the unfitness finding in each of the two cases, this Court concluded that "there

is no evidence in the record which rationally justifies a finding that [the bar applicant] was morally unfit to practice law." *Schware* v. *Board of Bar Examiners*, 353 U.S. at 246-247. And see *Konigsberg* v. *State Bar of California*, 353 U.S. at 273.[13]

In the instant case, the Missouri Board of Law Examiners has made a finding similar to that of the Boards in *Schware* and the first *Konigsberg* case which is similarly without rational justification in the record. Missouri Supreme Court Rule 8.07 regarding approval of bar applications provides in part that "In no event will permission be granted to register as a law student or to take the bar examination until the investigation as to moral character has been completed." Two such investigations were completed here, and petitioner was twice found to be of good

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13. In *Schware*, for example, New Mexico had denied Schware the opportunity to qualify for the practice of law with a finding that he was not of good moral character. This Court reviewed the evidence on which this finding was based and held that Schware had been deprived of Fourteenth Amendment due process in that "the evidence upon which the State relies—the arrests for offenses for which petitioner was neither tried nor convicted, the use of an assumed name many years ago, and membership in the Communist Party during the 1930's—cannot be said to raise substantial doubts about his present good moral character." 353 U.S. at 246.

The decisions of the Court last Term, in the second *Konigsberg* case, 366 U.S. 36, and *In re Anastaplo*, 366 U.S. 82, do not detract from the force of *Schware* and the first *Konigsberg* case and their application here. The second *Konigsberg* case and *In re Anastaplo* were "obstruction" decisions, cases where the Court held that it was "not constitutionally impermissible for a State . . . to adopt a rule that an applicant will not be admitted to the practice of law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications." *In re Anastaplo, supra* at 88. Clearly there was no obstruction by the applicant in the instant case. As the record demonstrates, petitioner was interrogated and cross-examined at length, and he candidly answered each and every question.

moral character (R. 93, 101; and see text, *supra*, pp. 2-3). He accordingly took the bar examination and, upon failing, wanted to take it again when the express complaints of lawyer-representation and witness-intimidation were raised against him. The former charge was rejected, but on the basis of the latter, petitioner was determined to be lacking in good moral character.[14]

The incident which the Board labeled as "the determinative factor" was the "specific acts and facts with regard to the telephone conversation" between petitioner and the Trombleys (R. 100). As specific acts and facts, the Board found the following:

> "That a few days after Trombley had advised Mrs. Weirhake to tell the truth when being questioned by the attorneys as to her relationship with Freeman (10) Zipkin called the Trombleys, saying that he was helping Freeman with his case (4, 10), that there was a problem in that Irene was in a truth telling mood and he felt Trombley and wife should meet with Zipkin and Freeman to see what could be done about Irene (5), that they ought to get together to decide what to do (9, 10, 11); Trombley inquired of Zipkin if he were trying to intimidate the witness, and that Zipkin said he thought it would be better for everybody all the way around if they met and decided what to do with Mrs. Weirhake (5)." (R. 97).

From these facts as found by the Board, the Board reached the astonishing conclusion that "applicant Michael Zipkin

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14. It is obvious that this is not the usual "burden of proof" case of a bar applicant. As petitioner had twice been investigated and cleared as to his character, he "had made out a prima facie case of good character . . . ." *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 42. The Board of Law Examiners hearing was not any general character examination; it was a special inquiry regarding specific charges, not too far removed from a disbarment proceeding.

did attempt to influence the testimony of Irene Weirhake . . ." (R. 98).

Petitioner's telephone call to the Trombleys was made approximately one month prior to the Freeman hearing (R. 80, 97). It is uncontroverted in the record that petitioner never talked with Dr. Freeman or anyone about making the telephone call to the Trombleys, that he never even told Dr. Freeman that he made the call after he did so, and that he never at any time talked in person to Irene Weirhake about her testimony or about anything connected with the Freeman matter (R. 79-80; and see text, *supra*, p. 16). Trombley himself testified that he had no knowledge that petitioner approached Irene personally, either before the telephone conversation or after (R. 61-62), and that after the telephone conversation, he had no further conversations with petitioner with reference to Dr. Freeman's hearing (R. 57; and see text, *supra*, p. 11). Indeed, Trombley even testified that in suggesting over the telephone to petitioner that he was attempting to intimidate a witness "I sort of maybe jumped to conclusions . . ." (R. 60). Therefore, for the Board to conclude that petitioner "did attempt to influence the testimony of Irene Weirhake" is without sufficient factual foundation. Board member Oliver effectively dismantled the reasoning of the Board majority in his dissent:

> "I cannot join with my colleagues because I do not believe that the evidence in the record as a matter of law, can be said to support the findings of the Board. I dissent because it is my view that any conclusion that Zipkin *in fact* attempted to influence the testimony of Irene Weirhake must rest solely upon the testimony concerning a single telephone conversation. And, not only must one accept Trombley's version of what actually was said in that telephone conversation, he must also accept Trombley's conclusion that what was

said did *in fact* constitute an attempt to intimidate a witness.

"If the problem was confined merely to a determination of whether Trombley or Zipkin was telling the truth as to what was said in that single telephone conversation, I would not feel bound to dissent from the judgment of my colleagues on that single question, although frankly, I would be bothered about such portions of Trombley's testimony that it made it possible for him to forget that he had offered sworn testimony in support of Zipkin's good reputation as recently as last year (14).

"I dissent from the Board's finding that 'Michael Zipkin did attempt to influence the testimony of Irene Weirhake by approaching Mr. and Mrs. Trombley with suggestions as testified to by Trombley' (page 6 of Majority Opinion) because I do not believe that the acceptance of Trombley's testimony is sufficient as a matter of law to establish that Zipkin did *in fact* attempt to influence the testimony of Irene Weirhake. It offends my juridical sense of reason to try to believe that had Zipkin actually wanted to intimidate Irene that he would have selected such an unlikely way to accomplish that purpose.

"The supreme law of the land requires, or at least such is my view of it, that 'officers of a State cannot exclude an applicant where there is no basis for their finding that he fails to meet . . . permissible standards', as stated in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232. And, as stated in the concurring opinion of that case, 'refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the due process clause'. I do not believe that there is a sufficient factual basis for a finding that Zipkin is not of good moral character on the theory that the Board accepts Trombley's conclusion that he

thought that Zipkin was attempting to influence the testimony of a witness." (R. 102-103).[15]

Petitioner recognizes, of course, that the Board stated that he was "not telling the truth" in his testimony about the telephone conversation with the Trombleys and "as to whether or not he knew when he telephoned them that Mrs. Weirhake was going to testify as to sexual relations with Freeman." (R. 98). But with all due respect to the province of the fact finder, a finding that petitioner was "not telling the truth," at least insofar as it may be a basis for finding a lack of good moral character, must also be rationally justified in the record. Here, there is no such rational justification. As stated in Board member Oliver's dissent:

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15. In relation to Board member Oliver's explosion of Trombley's conclusion that what petitioner said did in fact constitute an attempt to intimidate a witness, see *In re Schlesinger*, 404 Pa. 584, 172 A.2d 835, where the Pennsylvania Supreme Court reversed an attorney's disbarment upon both procedural and substantive due process grounds. In overturning one of the findings made by the Bar subcommittee, the court said:

> "The Subcommittee made a finding that the appellant was a Communist Party functionary and that he 'took an active part in formulating and carrying out Communist Party policies, including, inter alia, the formation of the Civil Rights Congress . . . . This finding was based, as already indicated, on [witness Matt] Cvetic's personal definition as to what constituted a party functionary and his opinion that his definition embraced the appellant because, as Cvetic related, he was a member of the Legal Commission of the Communist Party. Even taken at face value, Cvetic's testimony that appellant was a member of the Legal Commission of the Communist Party and that he took an active part in the formation of the Civil Rights Congress would not warrant a finding that the appellant was guilty of unprofessional conduct." 172 A.2d at 844.

Similarly here, Trombley's "opinion" that petitioner's telephone call came within Trombley's "personal definition" of attempted intimidation of a witness, even taken at face value, did not warrant the Board's finding that petitioner was lacking in good moral character.

"Nor do I believe that a finding that accepts Trombley's version of what was said on the telephone is a sufficient basis for a conclusion that Zipkin was 'not telling the truth' in the sense that such a finding could be a sufficient legal basis for the conclusion that Zipkin is of bad moral character. The recognized difficulty of determining perjury has caused the law to require proof of at least two credible witnesses or the corroboration by substantial evidence of the testimony of a single witness. See *State* v. *Brinkley*, 189 S.W.2d 314, 335.[16]

"Of course, the Board is not under duty to prove perjury in this case, but it is my view that under the law the Board is required to base its findings upon substantial evidence. To me, it is indeed a serious business to deny a man the right to take a bar examination on the sole basis of the full acceptance of the word of a single witness who has been but recently a patient of a psychiatrist (12)." (R. 103).

As pointed out by Board member Oliver, the uncorroborated testimony of witness Trombley is hardly deserving of being taken as the gospel truth.[17] Apart from this, however, a belief that Trombley was telling the truth in his version of the telephone conversation certainly does not compel the conclusion that petitioner was not telling

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16. In regard to the requirements of Missouri law in proving perjury, *cf.* Mr. Justice Black's statement in his dissenting opinion in the second *Konigsberg* case: "In this situation, it seems to me that Konigsberg has been rejected on a ground that is not supported by any authoritatively declared rule of law for the State of California." *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 58 (dissenting opinion).

17. The record clearly reflects that Trombley's admitted prejudice toward Dr. Freeman along with petitioner's continued association with him resulted in the complete severance of a once-close friendship and—notwithstanding his disclaimers to the contrary—in Trombley's hostility toward petitioner (R. 55, 57-58, 62-67; R. 69, 71-72, 84-85).

the truth or is of bad moral character because of his version. The Board hearing was held approximately five months subsequent to the telephone call (R. 1, 3, 80), and it is an indisputable fact of human experience not only that the memory of man weakens with the passing of time, but also that different people remember the same conversation in different ways. Certainly the considerable similarity between Trombley's and petitioner's testimony regarding the telephone conversation (R. 57, 71-72; and see text, *supra*, pp. 10-11, 13-14) is significant. And this Court, of course, is fully aware of the fact that the testimony of different witnesses regarding the same conversation or event inevitably varies.

Indeed, it defies reason for the Board of Law Examiners to conclude in regard to the lawyer-representation charge that

> "Because of the conflict of the testimony on this point and the fact that only this one isolated instance of holding himself out as an attorney is charged, the applicant is not disqualified on these grounds." (R. 99; and see text, *supra*, p. 17).

and not conclude the very same thing as to the intimidation charge. As to the former, Loren D. Baurichter and James Earl Grant testified that petitioner said "I think I know a little more about it than you do. I am a lawyer," whereas petitioner and Mrs. Baurichter testified that he said "I'm studying to be a lawyer and I possibly know more of the law than you do"; as to the latter Trombley testified that petitioner said words such as "I hear that Irene is in a truth-telling mood and let's get together about it," whereas petitioner testified that he said words such as "I hear Irene is going to testify against Dr. Freeman at his hearing and I thought you should know about it." It is contrary to legal logic for the Board to say that petitioner

is not disqualified because of the former variance in testimony, but that he can be disqualified in spite of the latter. And, of course, petitioner's telephone conversation with the Trombleys is just as much "one isolated instance" as the alleged attorney-representation occurrence.[18]

The fact that the Board asserts some inconsistencies in petitioner's testimony does not rescue the tenuousness of its "not telling the truth" conclusion. Aside from the fact that the asserted inconsistencies, if existent, are insubstantial and the fact that Trombley himself was inconsistent (see Board member Oliver's comment to this effect, *supra*, p. 24, and see text, *supra*, p. 11), the record demonstrates that the asserted inconsistencies are more illusory than real. For example, in apparent support for its statement that petitioner was not telling the truth "as to whether or not he knew when he telephoned [the Trombleys] that Mrs. Weirhake was going to testify as to

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18. In *Application of Courtney*, 83 Ariz. 231, 319 P.2d 991, the Arizona bar committee refused to certify applicant Courtney's good moral character because of a telephone call of his in which, according to witness Pace, Courtney attempted to solicit employment for an attorney for whom Courtney was working. Courtney denied the solicitation charge, and offered absolving testimony explaining the call. While stating that it was not "wholly convinced by petitioner's explanation," 319 P.2d at 994, the Arizona Supreme Court stated that "the Pace incident is the only one of this nature which has been suggested," referred to Courtney's admission in Minnesota and other evidence of his good character and concluded as follows:

> "We have, accordingly, arrived at this conclusion. Because the circumstances surrounding the occurrence of the Pace incident are such that the truthfulness of petitioner's explanation can never be conclusively demonstrated, and because his previous good moral character is established in the only place in which it could be established, we will resolve the decision in his favor."
>
> "It is ordered that . . . Courtney . . . be admitted to membership in the State Bar of Arizona." *Id.* at 995.

sexual relations with Freeman" (R. 98), the Board states that "Zipkin at first testified that he called the Trombleys because he had *heard* that Mrs. Weirhake was going to *accuse* Dr. Freeman of rape or sexual immorality (26), but he later testified that when he called the Trombleys he did not *know* what Mrs. Weirhake was going to *testify* to (50, 51, 54, 58)" (R. 97-98). (Emphasis added). Certainly there is a difference between hearsay rumor and actual knowledge, and between an accusation and testimony, and the record shows that petitioner was making a concerted effort to distinguish between them (*e. g.*, R. 87-88, 90). Thus, there is no real inconsistency here.[19]

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19. The other two "inconsistencies" which the Board noted are similarly unsupported by the record. The Board stated that "Zipkin said that the end of the friendship [with the Trombleys] was sometime in 1959 (46, 47), but later said that when he made the telephone call to Mr and Mrs. Trombley referred to below, which apparently was in the late spring of 1960, he was then under the impression that the Trombleys were still his friends (25) . . ." (R. 97). What petitioner actually said, as clearly shown by the record, was that his "*close* friendship" with the Trombleys terminated after their split with Freeman some time in 1959 (R. 84-85) and that "the phone conversation ended *any* friendship" (R. 85). (Emphasis added.)

The final inconsistency found by the Board is as follows: "Zipkin testified that he understood the Trombleys were instrumental in getting Mrs. Weirhake to testify (27), that they already knew about her being involved in the hearing when he called them (37) [although he also testified that he called them because he didn't think they knew (50)] . . ." (R. 97). (The brackets are the Board's.) What petitioner actually testified to, in trying to describe why the telephone conversation became so heated, was as follows: "The difficulty with the conversation was that not only had Trombleys known that Irene was going to testify but I understand [—not "understood" as stated by the Board—] they were instrumental in getting her to testify" (R. 72; and see text, *supra*, p. 14). Petitioner subsequently cleared up any possible confusion on the point (R. 77; and see text, *supra*, p. 14).

It is true that petitioner first testified that he had heard that Irene Weirhake was going to accuse Dr. Freeman of rape (*e. g.*,

In sum, there is no valid basis for the Board's conclusion that petitioner is wanting in good moral character. The Board itself indicated that "the evidence preponderates in favor of the reputation of the applicant for good character . . ." (R. 100). Such an admission was compelled by the testimony of Carl Sapp, Professor Anderson, Dean Covington and Ada Margaret Baurichter, the Board's own witnesses. Even Loren D. Baurichter testified that he saw no reason to think otherwise than that petitioner's reputation was good (R. 18; and see text, *supra*, p. 6), and the most damaging general assessment that witness Trombley could make of petitioner's reputation was that "I don't think it is particularly good." (R. 62-63; and see text, *supra*, p. 11).

When it comes right down to it, petitioner was a victim of circumstances in a community of aroused feelings against another. He has been deemed unfit for the bar on the basis of one emotionally charged participant's version of, and that participant's personal conclusion drawn from, a single telephone conversation—the actual language of which can never be determined. After devoting seven years in college and law school toward becoming a lawyer, and indeed after he had twice been found worthy of that profession upon regional investigation, petitioner has now been branded "lacking in good moral char-

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"I had been told that Irene Weirhake had gone loco and all of a sudden decided to accuse Dr. Freeman of rape or sexual immorality, whatever it was . . ." R. 71), whereas he later stated he heard only that Irene was going to testify against Dr. Freeman (*e. g.*, "[I heard t]hat Irene was going to testify against Freeman at his hearing. I didn't hear what about or what the charges were" (R. 89). But certainly this testimonial variance as to what he had heard some five months previously does not warrant any conclusion that petitioner was not telling the truth or is of bad moral character.

acter" because he made a phone call. Such a finding on such flimsy evidence surely constitutes a violation of due process. *Schware* v. *Board of Law Examiners*, 353 U.S. 232; *Konigsberg* v. *State Bar of California*, 353 U.S. 252; cf. *Thompson* v. *City of Louisville*, 362 U.S. 199; *Garner et al.* v. *Louisiana*, Nos. 26-28, this Term. As stated in the first *Konigsberg* case at the conclusion of the Court's opinion:

> "Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law. * * * A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action" *Konigsberg* v. *State Bar of California*, 353 U.S. at 273-274.

## CONCLUSION.

For the reasons stated, the judgment below should be reversed, and the case should be remanded to the Missouri Supreme Court with instructions to allow petitioner to take the Missouri bar examination.

Respectfully submitted,

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